# Medicon Plastic Industries Sdn Bhd v Syarikat Cosa Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-12-94
GOPAL SRI RAM, VC GEORGE AND ABU MANSOR JJCA
8 MAY 1995

***Sale of Goods*** *— Implied conditions — Fitness for purpose — Whether machine sold under patent or trade name so that there was no implied condition as to fitness — Whether buyer had relied on the seller's skill — Sale of Goods Act 1957 s 16(1)(a)*

***Sale of Goods*** *— Merchantable quality — Bottle-making machine not sold with moulds — Design of moulds supplied by manufacturer — Whether unmerchantability due to manufacturer's faulty design or defective manufacturing by buyer's mould maker*

The appellants ('the plaintiffs') had sued the respondents ('the defendants') for damages in respect of an Alpla hs 40/2000 blow moulding machine ('the Alpla') and a Boe-Therm temperature controller ('the Boe-Therm'), from the defendants as agent for their foreign principals ('the manufacturers'). It was alleged that the Alpla failed to meet specifications, was not merchantable and was not fit for the purpose for which it was bought, while the Boe-Therm was not fit for the purpose for which it was bought. The machines were required by the plaintiffs for the manufacture of plastic medicine bottles. The defendants denied liability on the grounds, inter alia, that they were only agents for the vendor and that both machines met their specifications, were merchantable and fit for their purposes and that the contract for the sale of each of the machines was for a specified article under its patent or trade name and accordingly the proviso to s 16(1)(a) of the Sale of Goods Act 1957 ('the SOGA') applied, or in any event, the plaintiffs had not relied on their skill and judgment, and therefore, there was no implied condition of fitness for purpose. The defendants further contended that any faults with the Alpla were caused by defects in the fabrication of certain moulds needed to commission the machinery which was the responsibility of the plaintiffs and which were fabricated locally at the instance of the plaintiffs. The plaintiffs replied that the designs drawings of the moulds provided by the manufacturers were faulty.

Abdul Razak J found in favour of the plaintiffs but on appeal a retrial was ordered. This was conducted before Shaik Daud J who dismissed the claim on the ground that the defendants were not liable as they were only agents for their principal and had themselves not entered into any contract with the plaintiffs. On appeal to the Supreme Court, the court held that the defendants were liable as agents for a merchant resident abroad and were by s 183(a) of the Contracts Act 1950, presumed to have contracted to be bound by the contract entered into by their principals. The case was remitted

to Shaik Daud J for him to adjudicate on the rest of the issues raised in the trial. His Lordship dismissed the plaintiffs' claim with costs on the grounds, inter alia, that there was no implied condition of fitness under s 16(1)(a) of the SOGA as the machines were purchased under their patent names and the defects were caused by the moulds fabricated by the mould makers commissioned by the plaintiffs. His Lordship also rejected the plaintiffs' claim for special damages and loss of profits. The plaintiffs have appealed.

**Held**, dismissing the appeal:

(1) Clearly the plaintiffs had relied on the defendants' skill resulting in there being an implied condition that the machines would be reasonably fit for the purposes for which they were required. The situation here was a far cry from the purchase of a common article sold under a popular brand name which is picked off the shelf, which is the sort of situation where the proviso under s 16(1)(a) of the SOGA could be invoked. The judge was therefore wrong in applying the proviso to s 16(1)(a) on the facts of the instant case.

(2) On the totality of the evidence, it was for the appellants to have had the moulds fabricated. Each set of the components required had to be fabricated together with the relevant mould, which the plaintiffs caused to be effected by using a local mould maker. There was no evidence to show that the manufacturers' design drawings were faulty and furthermore, the plaintiffs' mould maker had testified that he had not followed those designs completely at the request of the plaintiffs' managing director.

(3) Clearly neither the defendants nor the manufacturers could be blamed for the delay in having the machines commissioned. Apart from several minor problems, all the problems encountered appeared to have been due to either faulty electrical supply and/or the faulty fabrication of the component parts of the moulds, neither of which the respondents and/or the manufacturers could be held to be responsible for.

(4) The judge was correct in holding that the plaintiffs had failed to prove either the manufacturers' or defendants' liability and the special damages claimed. Furthermore, the plaintiffs' claim for loss of profits was based on projections made before the purchase of the machines and there was no evidence of any contracts for the supply of bottles having been entered into. Therefore, the judge's decision that the claim should be dismissed with costs was upheld.

**[Bahasa Malaysia summary**

Perayu ('plaintif') telah mendakwa responden ('defendan') untuk ganti rugi berkaitan dengan sebuah mesin acuan angin, Alpla hs 40/2000 ('Alpla'), dan sebuah mesin pengawal suhu Boe-Therm ('Boe-

A Therm'), daripada defendan sebagai agen untuk prinsipal asing mereka ('pengilang'). Telah dikatakan bahawa Alpla itu tidak mematuhi tentuannya, kualitinya tidak boleh dagang dan ianya tidak sesuai bagi tujuan untuk mana ia dibeli, sementara Boe-Therm itu tidak sesuai bagi tujuan untuk mana ia dibeli. Mesin itu diperlukan oleh plaintif untuk pembuatan botol ubat plastik. Defendan telah menafikan liabiliti B atas dasar, antara lain, bahawa mereka hanya merupakan agen bagi penjual dan bahawa kedua-dua buah mesin itu mematuhi tentuan mereka, boleh dagang dan sesuai bagi tujuan untuk mana mereka dibeli dan bahawa kontrak penjualan bagi setiap mesin itu adalah untuk sesuatu barang yang tertentu di bawah nama paten atau C perdagangannya dan dengan demikian proviso kepada s 16(1)(a) Akta Jualan Barangan 1957 ('AJB') terpakai, atau bagaimanapun, plaintif tidak bergantung pada kemahiran dan pendapat mereka, dan oleh itu, tidak terdapat syarat tersirat tentang kesesuaian untuk tujuan. Defendan selanjutnya menegaskan bahawa sebarang kerosakan Alpla disebabkan oleh kecacatan di dalam pembuatan acuan tertentu yang D diperlukan untuk menjalankan mesin itu yang menjadi tanggungjawab plaintif dan yang telah dibuat di sini atas arahan plaintif. Plaintif menjawab bahawa lukisan reka bentuk acuan yang dibekalkan oleh pengilang tidak betul.

Abdul Razak H telah membuat keputusan yang memihak kepada E plaintif tetapi atas rayuan, suatu perbicaraan semula telah diarahkan. Ini telah diadakan di hadapan Shaik Daud H yang telah menolak tuntutan itu atas dasar bahawa defendan tidak berliabiliti kerana mereka hanya merupakan agen bagi prinsipal mereka dan mereka sendiri tidak mengikat sebarang kontrak dengan plaintif. Pada rayuan F ke Mahkamah Agung, mahkamah itu telah memutuskan bahawa defendan menanggung liabiliti sebagai agen untuk seorang saudagar yang bermastautin di luar negeri dan di bawah s 183(a) Akta Kontrak 1950, dianggap sebagai telah bersetuju menjadi terikat oleh kontrak yang diikat oleh prinsipal mereka. Kes itu telah diremit semula kepada Shaik Daud H untuk memutuskan isu-isu lain yang telah G dibangkitkan di perbicaraan. Yang arif telah menolak tuntutan plaintif dengan kos atas alasan, antara lain, bahawa tidak terdapat syarat tersirat tentang kesesuaian di bawah s 16(1)(a) AJB kerana mesin tersebut telah dibeli di bawah nama paten mereka dan kecacatan itu disebabkan oleh acuan yang dibuat oleh pembuat acuan yang telah digaji oleh plaintif. Yang arif juga telah menolak tuntutan plaintif H untuk ganti rugi khas dan kehilangan keuntungan. Plaintif telah membuat rayuan.

**Diputuskan**, menolak rayuan itu:

I (1) Adalah jelas bahawa plaintif telah bergantung pada kemahiran dan pendapat defendan dan akibatnya terdapat suatu syarat tersirat bahawa mesin itu agak sesuai bagi tujuan untuk mana mereka diperlukan. Keadaan di sini adalah jauh berbeza daripada pembelian sesuatu barang biasa yang dijual di bawah jenama

popular yang diambil dari rak, yang merupakan suatu keadaan di mana proviso di bawah s 16(1)(a) AJB boleh digunakan. Oleh itu, hakim adalah salah apabila beliau memakai proviso kepada s 16(1)(a) atas fakta kes ini.

(2) Atas keseluruhan keterangan, adalah menjadi tanggungjawab perayu untuk membuat acuan itu. Setiap set komponen yang diperlukan mesti dibuat bersama dengan acuan yang berkenaan, dan plaintif telah menggajikan seorang pembuat acuan tempatan untuk membuatkannya. Tidak terdapat apa-apa keterangan untuk menunjukkan bahawa lukisan reka bentuk yang diberikan oleh pengilang itu adalah cacat dan lagipun, pembuat acuan plaintif telah memberi keterangan bahawa, atas permintaan pengarah urusan plaintif, beliau tidak mengikut reka bentuk itu betul-betul.

(3) Adalah jelas bahawa kedua-dua defendan dan pengilang tidak boleh disalahkan untuk kelengahan dalam mendapatkan mesin itu untuk berjalan. Selain daripada beberapa masalah kecil, semua masalah yang dialami nampaknya disebabkan oleh bekalan elektrik yang kurang memuaskan dan/atau kecacatan dalam pembuatan bahagian komponen acuan itu, untuk mana kedua-dua responden dan/atau pengilang tidak boleh dipersalahkan.

(4) Hakim adalah betul dalam memutuskan bahawa plaintif telah gagal membuktikan kedua-dua liabiliti pengilang atau defendan dan ganti rugi khas yang dituntut. Lebih-lebih lagi, tuntutan plaintif untuk kehilangan keuntungan adalah berdasarkan unjuran yang telah dibuat sebelum pembelian mesin itu dan tidak terdapat keterangan tentang pengikatan sebarang kontrak untuk pembekalan botol. Oleh itu, keputusan hakim bahawa tuntutan itu seharusnya ditolak dengan kos adalah disahkan.]

**Notes**

For cases on implied conditions in a sale of goods, see 11 *Mallal's Digest* (4th Ed) paras 611–613.

For cases on merchantable quality, see 11 *Mallal's Digest* (4th Ed) paras 616–617; [1990] Mallal's Digest 1129–1130; [1993] Mallal's Digest 1224.

**Cases referred to**

*Baldry v Marshall* [1925] 1 KB 260 (refd)

*Cullinane v British 'Rema' Manufacturing Co Ltd* [1954] 1 QB 292; [1953] 2 All ER 1257; [1953] 3 WLR 923 (folld)

*Sum Kum v Devaki Nair & Anor* [1964] MLJ 74 (folld)

**Legislation referred to**

Contracts Act 1950 s 183(a)

Sale of Goods Act 1957 s 16(1)(a)

**Appeal from**: Civil Suit No 241–1979 (High Court, Kuala Lumpur)

*A Kanesalingam* (*Kanesalingam & Co*) for the appellants.
*Chin Yew Meng* (*Allen & Gledhill*) for the respondents.

*Cur Adv Vult*

**Gopal Sri Ram JCA**: I have had the benefit of reading the judgment of my learned brother Justice VC George JCA and respectfully agree that for the reasons stated therein this appeal must be dismissed with costs. All orders made by the learned Judge in the court below are affirmed. The deposit paid into court by the appellant is to be paid out to the respondent towards account of its taxed costs.

**VC George JCA**: The appellants as plaintiffs had sued the defendants, the respondents here, for damages said to have been suffered as a result of their purchase of two items of machinery, referred to in the proceedings as an Alpla hs 40/2000 blow moulding machine and a Boe-Therm temperature controller respectively, the contract in respect of which sales was entered into by the defendants as agent for their foreign principals, which machinery it was alleged, in respect of the Alpla hs 40/2000 failed to meet specifications, was not merchantable and was not fit for the purpose it was bought and in respect of the Boe-Therm was supplied minus what was referred to as a heating element and as such was not fit for the purpose it was bought. The defendants' response to the plaintiffs' claim, shortly stated, are that they were not liable because they were only agents for the vendor their principals and that in any event both the machine met the specifications, were merchantable and fit for the purposes for which they were purchased. It was further contended that the contract for the sale of each of the machines was for a specified article under its patent or trade name and that accordingly (invoking the proviso to s 16(1)(a) of the Sale of Goods Act 1957) or in any event, the plaintiffs had not relied on the defendants' skill and judgment and as such there was no implied condition as to the fitness of the equipment. The defendants contend that if there was anything wrong with the Alpla it was caused by defects in the fabrication of certain parts needed to commission the machinery the fabrication of which was the responsibility of the plaintiffs and which in fact were fabricated locally at the instance of the plaintiffs. In any event the allegation that the plaintiffs suffered damages was denied and put into issue.

The case was initially disposed of by Abdul Razak J who had found in favour of the plaintiffs. On appeal a retrial was ordered. This was conducted before Shaik Daud J who dismissed the claim on the first of the many grounds taken by the defendants, that the defendants were not liable as they were only agents for their principal and had themselves not entered into any contract with the plaintiffs. Having arrived at that conclusion the learned judge did not adjudicate the other issues raised although all the evidence that the parties wanted to adduce in respect of all the issues had

been adduced and submissions in respect of them had been made. The Supreme Court allowed the plaintiffs' appeal against Shaik Daud J's decision holding that the defendants were in fact agents for a merchant resident abroad and were by s 183(a) of the Contracts Act 1950, presumed to have contracted to be bound by the contract entered into by their principals and were liable. The case was remitted to the judge for him to adjudicate on the rest of the issues raised in the trial.

This the learned judge did and held:

(i) (once again ignoring the s 183(a) presumption) that there was no implied condition of fitness under s 16 of the Sale of Goods Act 1957 because it was not the defendant who sold the equipment to the plaintiff;

(ii) that in any event the equipment was purchased under its patent or trade mark and accordingly by virtue of the proviso to s 16(1)(a) of the Sale of Goods Act 1957 there was no implied condition as to its fitness;

(iii) that the major defects complained of in respect of the Alpla were in respect of the mould fabricated here, not by the defendants but by mould makers commissioned by the plaintiffs;

(iv) that the Alpla functioned perfectly without the moulds and the defendants should not be held responsible for the malfunctioning of the machine when it was operated with the moulds;

(v) in respect of the allegation that the other machine ie the Boe-Therm Temperature Controller, had been supplied without what was referred to as a heating element, that the plaintiffs had failed to prove that the machine was to be supplied with such heating element;

(vi) in respect of damages claimed that the plaintiffs had failed to prove the special damages, that that part of the claim based on a guarantee was untenable and that the claim for loss of profits is based on mere 'conjecture' and fails.

The plaintiffs' claim was dismissed with costs. The plaintiffs appealed.

Counsel for both the appellants and the respondents in the course of the appeal, lead us in the course of the submissions made, through the whole of the evidence lead and the submissions that had been made in the court below and we decided that the best way to approach this appeal, in the circumstances, was to initially ignore, as it were, the learned judge's written judgment and review the whole case ourselves always having in mind that the learned judge had had the advantage of having seen and heard the witnesses.

Medicon Plastic Industries Sdn Bhd, the appellants, had been interested in producing in Malaysia plastic bottles with screw-on caps for the use of medical practitioners for dispensing medicine. Syarikat Cosa Sdn Bhd, the respondents, were agents for the Austrian manufacturers of the Alpla hs 40/2000, said to be suitable for the production of plastic bottles that the appellants intended to produce. By a letter dated 1 March 1977 the respondents gave some particulars of the machine and the terms of the proposed sale. What was offered was stated to be an 'Alpla blow moulding machine type hs 40/2000 suitable for production of plastic

hollow articles, including extruder 40mm diameter, built-in hydraulic system, without additional attachments'. However, in fact there were some additional attachments specified in the offer, namely two 'nitralloy steel screws' and a 'single extrusion head'. The price quoted was DM66,560 CIF Port Klang. The machine was stated to be covered by a "manufacturer's guarantee" of six months from date of delivery. The respondents were also agents of the Swiss manufacturers of the other machine, the Boe-Therm Temperature Controller Type Cool-10 which also was said to have a manufacturer's guarantee of six months from date of delivery. This machine was to be operated in conjunction with the Alpla blow moulding machine to control the temperature of the water used in the Alpla.

Orders were placed with the respondents for one Alpla and one Boe-Therm. Soon after delivery, and before the machines were commissioned, the appellants complained in respect of the Alpla, both to the respondents and to their principals the Austrian manufacturer. In respect of the Alpla, the complaints made were that: (1) an instruction manual had not been supplied; (2) 'there were no blow pins or cutting sleeves with the machine — ...'; and (3) there was no 'bottom deflashing device with the machine'. A demand was made for the immediate supply of the said three items as well as 'an assortment of spare parts' and 'a twin cavity 203 blow mould'. It was also pointed out to the respondents that the 'blow heads' as referred to in the packing list were not the ones ordered and that a part of the machine referred to as a 'screw' was rusty. The petitioners also demanded a set of 'machine tools'. They warned the manufacturers and the respondents that they would hold them responsible for the delay caused in commissioning the machine because of the lack of the manual and the said parts.

Before moving on, we would straightaway dispose of the invocation by the respondents of s 16(1)(a) of the Sale of Goods Act and the proviso thereto which we reproduce here:

> Subject to the provisions of this Ordinance and of any other law for the time being in force, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows —
>
> (a) Where the buyer, expressly or by implication makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he is the manufacturer or producer or not) there is an implied condition that the goods shall be reasonably fit for such purpose.
>
> Provided that, in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose.

In England, where there used to be a similar provision and proviso, the cases restricted the proviso to the point where it only applied if an article was ordered by its trade name — see *Benjamin's Sale of Goods* (3rd Ed) at para 830 where reference is made to *Baldry v Marshall* [1925] 1 KB 260 in which Bankes LJ suggested the following test for the operation of the proviso.

> Did the buyer specify it under its trade name in such a way as to indicate tat he is satisfied, rightly or wrongly, that it will answer his purpose, and that he is not relying on the skill or judgment of the seller, however great the skill or judgment may be?

In that same case, Sargant LJ said:

> It seems to me that the articles which are dealt with in that proviso are primarily things like patent medicines and common articles sold under well-known trade names. In my judgment the proviso does not apply to an article like a motor car, which is sold under a very elaborate and specific description.

In the instant case, PW2 had visited the manufacturer's factory in Austria to inspect the type of machines to be ordered. The Alpla that was eventually ordered was ordered because it was recommended to the plaintiffs by PW2 who, when he had been with a company called JAAF Trading had purchased and used an Alpla machine. It was ordered with specifications to meet the plaintiffs' special requirements. PW2 testified (at p 50 of the record of appeal):

> I bought the machinery from defendant. Specifications for the ABM machines was agreed between me and defendant company (see p 38 of A). This agreement was reached after some negotiations. This was a continuation of my previous order as in p 8 of D.

and again at p 51:

> I do not agree that I bought a standard ABM. Certain parts of the machine had to be made specially for us like the double blow head, the bottom deflashing system, two arms twin cavity mould and associated parts which will include the blow pins, cutting sleeves, the pins and dies and dye holding brackets, stripper plates.

Clearly the plaintiffs had relied on the seller's skill resulting in there being an implied condition that the machines would be reasonably fit for the purposes for which they were required. The situation here was a far cry from a purchase of a bottle of patent medicine or some common article like an electric iron or even a television set, sold under a popular brand name where you pick it off the shelf as it were, which is the sort of situation where the proviso could be successfully invoked. In our judgment the learned judge was wrong in applying the proviso to s 16(1)(a) on the facts of the instant case.

I pause to note that in England, in 1973, as a result of the test suggested in *Baldry v Marshall*, the proviso was removed by an amendment to the Act.

In respect of the Boe-Therm, the written complaint to the respondents was that it did not have a 'separate control device on the left side of the equipment as shown in the leaflet'. Some time later, the petitioners complained that it did not include a heating element which they contended was to be included in the machine they had ordered.

In response it was pointed out that in respect of the former of the complaints, that the model delivered was the improved model which did

not need the missing control device and as to the other complaint, that what the respondents had offered, in response to the enquiries by the appellants, was 'the Type Cool 10 without heating'. That the machine was to be without the heating element or section is indeed seen to be the position in the respondents' letter of 1 March 1977 at p 473 of the record of appeal. The particulars of the Bio-Therm set out in the packing list sent to the appellants together with the invoice and other shipping documents (at p 496 of record of appeal) also state that the machine supplied was without the heating element. PW2 the managing director of the plaintiffs who was the main witness for the plaintiffs relied on the invoice at p 495 of the record where the words 'without heating element' were omitted from the description of the machine. However the offer (which was accepted) was for the machine 'without heating'. The invoice in any event does not say otherwise and was delivered with the packing list in which it was clearly stated that the equipment was without the heating element. The appellants also sought to rely on what PW2 called a leaflet and on an instruction manual each of which appears to be for a machine with the heating equipment.

However there can be any number of leaflets, brochures, advertisements, letters and so on but in the final analysis what it comes down to is, what was offered and what was accepted. Here, as has been seen, the offer expressly excluded the heating section or element and that appears to be the offer that was accepted. It is important to note that consistent with that, there is no record of the petitioner taking issue contemporaneously with the respondents or the manufacturers in respect of the 'without heating' aspect of the machine. In his testimony PW2, referring to the Boe-Therm, said at p 68 of the record of appeal, 'I agree that nowhere in the correspondence did I say that the BT–10 should come with the heating system'.

In our judgment the plaintiffs had failed to prove that the Bio-Therm was to be supplied with the heating section or element. The finding of the judge on this aspect of the matter has to be and is affirmed. Further, and in any event how and to what extent the lack of the heating element in the Boe-Therm affected the plaintiffs has not been explained or explained with the clarity expected of a plaintiff suing for damages.

Apparently having the heating element in the Boe-Therm would have enabled the appellants to manufacture the caps for the bottles in the Alpla simultaneously as the bottles were being made. At p 87 of the record PW2 went on to testify that, 'If the BT (ie the Boe-Therm) came with heating I could use both the BT as well as the ABM (ie the Alpla) simultaneously.'

However he went on to say in the next sentence, 'Even without the heating I could still use both simultaneously with the aid of my own equipment.'

It follows that even if the Boe-Therm was to have come with the heating element, without any evidence of any reduction of the intrinsic value of the equipment, about all that the appellants are entitled to in

damages is the cost of mitigating the damage ie the cost of bringing to aid PW2's 'own equipment'. There is no evidence of such reduction of value or of such costs or of what using other equipment entailed, in respect of time, inconvenience and so on. We are of the opinion that the learned trial judge was justified in finding no merit in the plaintiffs' complaints (and on the claims arising therefrom) in respect of the Boe-Therm.

As to the alleged missing items in respect of the Alpla, the contention of the respondents was that they were 'additional attachments' which it was pointed out, and as has been seen, were specifically excluded from the written offer made by the respondents. The blow heads, it was explained without challenge, were in fact the ones required by the petitioners and were as a result of a typing error erroneously described in the packing list.

The manual was replaced on or about 16 December 1977 but the appellants again complained that it appeared to be for some other model of machine and in any event 'technical specification' with regard to the die, blow pins and cutting sleeves were not included and the last few pages of the manual appeared to be missing. In respect of this the respondents contended that the manual was meant for the hs 40/2000 as well as the other model and the die, blow pins and cutting sleeves had to be fabricated by whoever makes the moulds on the basis of measurements to be taken by the mould maker.

Now the Alpla was eventually commissioned by one Lim Chim Sing who testified as PW5. He had been at the relevant time a 'service engineer' with the respondent company and testified that he had been sent by the respondents to commission the Alpla.

One of the problems in this case was that the witnesses were testifying in 1991 in respect of events that had taken place well over ten years earlier ie from about the end of 1977 and up to mid 1978. Fortunately, at least as far as the role played by Lim was concerned, there were his service reports which were produced from which, supplemented by the oral testimony, a fairly clear picture of the events vis-à-vis the commissioning and malfunctioning of the Alpla can be discerned. PW2 can be deemed to have expressed his agreement with the contents of each of the reports, save one, by countersigning them particularly as in one report, in countersigning it, PW2 noted his disagreement with part of Lim's opinion.

Lim's earliest report, of 29 November 1977, shows that he ascertained that all the components of the Alpla as per the packing list has been delivered. The machine was put together but he notes that it could not be commissioned because of the lack of 'nozzle blow pin mould' and of water and electricity supply.

As to the electricity supply, three-phase wiring was required and was not available in November 1977 at the plaintiffs' premises where the Alpla was to be installed.

Special moulds were needed for each type of bottle to be produced. Each mould had to be attached to the Alpla with components referred to as a die, a blow pin or nozzle and cutting sleeve all of which, according to the respondents, had to be fabricated by the mould maker. The moulds

themselves were designed by the manufacturers of the Alpla who supplied the appellants with drawings of the design on the basis of which the mould maker was to fabricate the moulds. It was the respondents' case that it was for the appellants to employ a mould maker to fabricate the mould as well as the related die, blow pin or nozzle and cutting sleeve. The plaintiffs on the other hand contend, but not seriously, that it was for the manufacturers to supply the moulds. The moulds did not come cheap. There is some evidence that some RM86,792 was incurred by the appellants for the fabrication and supply of moulds that they needed which alone suggests that it could not have been in the contemplation of the parties that the fabrication of the moulds were included in the agreed cost of the Alpla of DM66,560 (in 1977 the Ringgit was almost at par with the DM).

Consistent with the respondents' contention that it was for the plaintiffs as a separate exercise to have the moulds and the related components which had to be custom-made, fabricated, is the fact that the plaintiffs did ask the respondents to give a quotation for certain moulds and for the relevant components. But they eventually placed orders with a local mould maker (who had been recommended to them by the respondents) to manufacture various types of moulds for them. At p 601 of the record is a letter of the plaintiffs to the mould maker dated 14 August 1981 upbraiding the mould maker in respect of the poor quality of the moulds that had been fabricated by him for the plaintiffs from as far back as March 1978. We could find nothing in the contemporaneous correspondence that suggests that the responsibility for providing the moulds, save one one ounce mould was that of the respondents. The submissions made by counsel for the plaintiffs in the court below suggest that it was accepted by the plaintiffs that the moulds were not part of the contract for the supply of the Alpla.

It is our judgment, on the totality of the evidence, that it was for the appellants to have had the moulds fabricated. It is also our judgment that each set of the pin, die and blow pin or nozzle and cutting sleeve had to be fabricated together with the relevant mould by the mould maker, which the plaintiffs caused to be effected using the local mould maker Lee Kum Chuen who testified as PW4. The one one ounce mould which was also made by the mould maker, Lee, but at the instance of the manufacturers of the Alpla was given to appellants gratuitously. The related pin, die and nozzle and cutting sleeve in respect of this mould does not appear to have been provided by the respondents and appears to have been fabricated by Lee on the instructions of the plaintiffs.

Now, there is no doubt that the appellants ran into a whole host of problems in respect of the production of bottles. They put the blame on defects in the Alpla but the manufacturers contend that there was nothing wrong with their machine. They contend that the problems that the appellants encountered were, in respect of the initial delay, that the appellants did not have both the water supply and three-phase electrical wiring which were required for the safe and proper running of the machine. In respect of the rest of the problems other than delay the manufacturers and the respondents blamed the poor quality of the component parts of

the moulds ie the die, blow pin or nozzle and cutting sleeves. PW2 contended that the poor quality of those components was because the design drawings of the mould provided by the manufacturers were faulty. Neither he nor anybody has explained to the court what in fact was wrong with the drawings that could result in the components to the moulds being faulty. The mould maker in his testimony had referred to the design drawings. Even he was not asked whether there was anything wrong with the drawings. Further he had testified that on the instructions of PW2 he had not followed the drawings '100%' because PW2 had wanted him to have the shoulders of the bottles 'more rounded' than as prescribed in the design drawings.

Apart from fabricating the moulds according to the drawings, the mould maker had to take measurements of the Alpla to fabricate the die, nozzle and blow pin which had to be, as has been seen, custom made and aligned to fit the machine. Measurements were taken. Lim's report of 7 December 1977 shows that he accompanied Lee to the machine for Lee to take the relevant measurements.

It would appear that it was only on 10 January 1978 that the required water supply was available (electricity was available earlier on 20 December 1977). The report of 10 January 1978 shows that the components for the mould were by then available but they were found to be 'too big' and one component fabricated by Lee, that presumably had to be screwed on, had a right hand thread instead of a left hand thread. The mould maker Lee in his testimony denies that there was a problem with the thread. But he admitted that one component did not fit because its diameter was too big. He had to and modified it. He also testified that he had been ordered by PW2 to modify the one ounce mould. It was put to him that the problems that the plaintiffs encountered with the Alpla were because of the defects in the fabrication by him of the moulds and their component parts. He said that they were not defective 'as they were made according to the diagram'. However it has to be remembered that earlier in his testimony he had said that he had not followed the 'diagram' 100%. He went on to testify that the component parts 'could go wrong in about 10% of the cases and if it went wrong it could be easily rectified'.

Lim' service report of 12 January 1978 shows that he was back with the mould maker Lee at the machine, for measurements to be taken to rectify the error in the components Lee had made. On the next day, 13 January 1978, it was found that the blow pin was still incorrect. Lim reported, 'this time the screw in length too short'. On 17 January 1978, Lim reports 'Blow pin tested OK and machine running fully automatic on dry cycle'. However on running it on 18 January 1978 with the plastic material that was to be 'blown' into bottles, Lim reported:

> The material came out from and around the nozzle. It was found that the sealing of die was incorrect causing it to slant against the pin. Informed client of the mistake made with the pin and die.

We pause to note again that all these reports were countersigned by the plaintiffs' representatives PW2.

On 19 January 1978, it was again found that the pin was 'very much slanted'. Some adjustments were made. Then it was found that the cutting knife which to be effective had to be heated was not getting heated. Lim found that this was because a electrical relay contact was dirty.

The report of 20 January 1978 shows that at least the machine functioned well until a faulty switch caused it to come to a stop. On replacing the switch Lim reported that 'the machine was running perfectly OK. Customer was very happy with the performance of the machine'.

In countersigning the report two days later on 23 January 1978, PW2 stated 'the machine is running well but the material not coming out evenly due to slanting of the "pin"'.

The next visit of Lim to the machine appears to have been on 21 February 1978 when according to his report there were problems which he attributed to the pin and die having been incorrectly made resulting in the plastic material that 'extruded' ie forced through the die and the nozzle, 'is either slanted or oozing out at the side of the nozzle'. He also wrote that there were problems because the plaintiffs were using '100% recycle material'. This is the one report that PW2 had refused to sign. By a letter dated 22 February 1978 to the plaintiffs the respondents reiterated Lim's opinion that the problems were caused by the incorrectly made pin and die. Going by the reports, Lim's next visit was in April 1978. On 4 April 1978 an electronic switch was changed. Problems found on 7 April 1978, according to Lim were caused by an electrical short circuit that was caused by the removal of some part of the machine by the plaintiffs. PW2 noted that that was not true. However it would appear that the machine was effectively repaired by Lim. On 19 April 1978, Lim found that there was again something wrong with the electrical supply resulting in 'shorting'. He also found that one of the three phases of the electricity supply was not working. On 26 April 1978, he appeared to have reconfirmed that to be the problem and advised the plaintiffs to refer the matter to the National Electricity Board. Lim, according to the report, brought in an expert on compressors who on 26 April 1978 confirmed that the motor had been blown out or 'burnt' because it was run on only two phases. All these reports were signed by PW2 without comment. All PW2 could say in his testimony in respect of this was that he could not understood how this could have happened. Clearly neither the respondents nor the manufacturers of the machines can be blamed for the delay in having the machines commissioned. And apart from the dirty electrical contact point that caused problems in respect of the heating of the cutting knife (which problem was rectified by cleaning the point) and the faulty switch (which was replaced) all the problems encountered before the report of 1 August 1978 appear to have been due to either faulty electrical supply and/or the faulty fabrication of the component parts of the moulds for neither of which the respondents and/or their principals can be held to be responsible.

The next report, the last by Lim, which was dated 1 August 1978, also countersigned by PW2, sets out the complaints by the plaintiffs which are referred to as 'minor problems'.

1 August 1978

Presently the m/c is on production but with minor problems still has to be solved. Problems given by client is as follows:

(1) Intermittent heating of the parison cutting knife.

(2) Material oozes out through the nozzle together with the support air.

(3) Blow mandrel automatically comes down slowly thus hitting against the mould after a few cycles of operation.

(4) Extruder screw varies in speed.

(5) Extruder gear box is with only a little quantity of grease as has been removed by client during their service. The reason is because the grease tend to seep into the screw. Advised client as this is not advisable as it might cause further damage to the gear box. Date for service for the abovementioned has still to be fixed by client.

PW2 in his testimony said the problems set out in this report were never solved. He said:

> For the whole of 1978 and 1980 we tried and believed we could call others to repair the machine as the defendant's technician was grossly incompetent and did not know the machine properly, not supplied with proper manual. Every time we call a technician from other companies first thing he would ask is for the instruction manual, otherwise they refuse to touch the machine. After that we did not operate the machine.

In cross-examination Lim said that he prepared his reports after he had rectified all the complaints but on re-examination he said that the defects set out in the 1 August 1978 report were not rectified 'because it comes intermittently'. He also said that he did not know if there were similar complaints after 1 August 1978. 'It is possible' he said that the client had attended to the complaints themselves without reference to him. Items (2) and (3) of the complaints, he thought, were matters not the problem of the manufacturers.

DW1 Durangor Markus was a mechanical engineer working with the people who at the time of the trial were the manufacturers of the Alpla hs 40/2000 machines. In his testimony he explained with some clarity as to how the machine functioned. He was referred to the Lim report of 1 August 1978. In his testimony he dealt with each of the problems. He shared Lim's view that the problems were minor problems.

As to item (1) the intermittent heating of the parrison cutting knife, he thought that it must have been a defect in a component called a sleeve and that there could have been a electrical contact problem both of which he considered minor problems that could have been easily rectified, by changing the sleeve in respect of the one and by cleaning the contact in respect of the other.

As to item (2) he thought it could have been a mistake in reassembling what is called the parrison head which in his opinion could easily have been rectified. He also thought it could be a defect in the nozzle which as has been seen was fabricated as a component of the mould.

A Item (3) was caused by something being damaged or wrongly adjusted. He thought that it could have been rectified by changing certain switches.

Item (4) he thought should not happen in that in his opinion it was simply a question of adjusting the speed.

As to item (5), ie escape of grease from the gear box, he explained
B that the gear box was sealed and in any event did not contain grease.

In cross-examination this witness testified that all the defects shown in the 1 August 1978 report could have been easily rectified except item 3. We pause here to look again at the further amended statement of claim to find that the plaintiffs plead that after July/August 1978 the only remaining
C complaint they had was the lack of the heating element in the Boe-Therm. Paragraph 10 and 11 of the statement of claim are as follows:

> 10 On 28 February the plaintiffs gave notice to the defendants that the (if) defendants were unable to correct the defects and put the equipment in working condition over a period of almost three (3) months the plaintiffs
D would itself purchase the missing/defective parts from other suppliers and repair the equipment as far as was possible to put it in working condition and thereafter claim all losses sustained from the defendants.
>
> 11 The plaintiffs practically completed the remedial work on the equipment which involved fine and tedious adjustments from time to time and began production in July/August 1978 but one equipment the Boe-
E Therm temperature controller continues to be without heating requiring the blow moulding and injection moulding to be done separately instead of simultaneously.

Paragraph 11 is an unequivocal statement that the difficulties with the Alpla were surmounted by August 1978. DW1 Durangor Markus's
F testimony that the problems set out in the 1 August 1978 report (referred to therein as minor problems) could easily be rectified is consistent with the plaintiffs' said para 11. Significantly the items in the particulars of special damage claimed in the statement of claim is restricted to the eight months ending in August 1978:

G Particulars of special damage

| | |
|---|---|
| (1) Bank interest for eight months at approximately 10%pa on RM75,000 (part purchase price) | 5,000 |
| (2) Rental paid for premises (RM550 x 7 months + RM750 | |
| H for July 1978) | 4,600 |
| (3) Salaries and wages to employees for eight months | 21,600 |
| (4) Repairs and modifications/ improvisation of parts | 15,000 |
| I | RM46,200 |

It would seem that by 'repairs modification and improvisation of parts' the plaintiffs had surmounted the problems with the Alpla within eight months of the installation of the machines, ie by August 1978 which narrows down

the period for judicial enquiry to November 1977 to August 1978. We pause to note that what exactly was repaired and modified and improvised for RM15,000 has not been disclosed to the court. Apart from the evidence of DW1, the court had the opinion of another engineer, PW4 Lim Kim Seng, in respect of the technical aspects of the Alpla. However, we did not find this expert's evidence particularly helpful. For one thing he had not examined the machine while it was operating. Inter alia he pointed out to various aspects of the machine which he thought were not properly installed. No doubt he ended his testimony by informing the court, in answer to a question put by the court, that the defects he had highlighted may have contributed to the malfunctioning of the machine. However there is nothing in the record which suggests that he was aware what the problems were. Startlingly we find that he wrote his report on 5 january 1978 at which stage there had been no attempt to commission the machine because inter alia the required water supply and the moulds and the components of the moulds were not available!

The evidence suggests that at least up to August 1978, each time there was a problem with the Alpla the service engineer Lim was sent for and as he has set out in written reports what the complaints were and what if anything he did in respect of them, the court is in a position to come to a conclusion as to what was the cause of the problems. We have examined the reports and the related evidence including that of PW2 and we cannot but reiterate that apart from problems with the electric supply (not the fault of the respondents or the manufacturers), the substantial part of the problems were caused by defects in the moulds and/or the components that came with the moulds. Consistent with this finding is the letter to the mould maker by the plaintiffs' managing director PW2 dated 14 August 1981 referred to earlier in this judgment, where he is seen writing with relevance to orders made in early 1978 for moulds:

> You have billed us for moulds that have been completed/partly completed or unsatisfactorily in accordance with our technical drawings and specifications.

The letter goes on to give some particulars of defects in some seven different moulds that had been fabricated by the mould maker.

There was no evidence for the court to hold that the manufacturers' design drawings caused the mould maker to make defective moulds and in any event as has been seen the mould maker's evidence which was not contradicted was that he had been instructed by the plaintiffs not to follow '100%' the drawings.

Another complaint of the appellants was that the Alpla did not have what was referred to as a deflashing device. This is a device to cut the 'tails' of each bottle as it was blow moulded. The evidence is far from clear whether the plaintiffs were contending that the device was to be part of the machine or that the machine did not have a provision for the attachment of such a device.

The respondents had contended without any effective challenge that this deflashing device was another additional part that had to be ordered

separately and which, like the components to the moulds, had to be fabricated by the mould maker one for each mould because it had to 'fit' the mould concerned if it was to function effectively. In any event there was no evidence of the extent of damages suffered (if any) as a result of the alleged omission to provide the alleged missing component.

In the face of the lack of clarity in the plaintiffs' contention in respect of this aspect of the case and the lack of evidence to support either of the two stands that can be said to have taken by the plaintiffs in respect of the deflashing device, we have to and hold that there was no merit in this aspect of the plaintiffs' complaints.

It is our judgment the plaintiffs failed to prove liability on the part of either of the manufacturers or the respondents. We uphold the learned judge's judgment 'that (he) was satisfied on a preponderance of evidence that the plaintiffs has failed to show that the defendant or the manufacturers of both the equipment were liable'.

The learned judge had gone on to hold that in any event the plaintiffs had failed to prove the damages as prayed or at all.

A claim for damages special and/or general has to be based on evidence of damages suffered.

In respect of the special damages claimed, the learned judge pointed out that 'sad to say not one iota of evidence was led by the plaintiffs on any part of the items claimed under special damages'. In *Sum Kum v Devaki Nair & Anor* [1964] MLJ 74 at p 75, Thomson LP said:

> I would, however, add one observation of a general nature. This is by no means the first appeal this court and its predecessor have had to deal with in which somewhat insufficient attention has been given at the trial to the question of giving adequate evidence on the question of quantum of damages. It is for counsel in such cases to devote a little more attention to that aspect of the matter in future. As Lord Goddard said in the case of *Bonham-Carter v Hyde Park Hotel, Ltd* (1948) 64 TLR 177 at p 178:
>
> > 'Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the court, saying: 'This is what I have lost; I ask you to give me these damages.' They have to prove it.'

No attempt or effective attempt had been made to prove the special damages claimed. The rejection by the learned judge of the claim for special damages is affirmed.

There were three heads of damages claimed as general damages. First there is a claim of RM275,000 said to be reimbursement to be paid to PW1 in respect of a guarantee. Apparently the plaintiffs had borrowed money from Bank Buruh on the security of a guarantee given by PW1. The bank had called on the guarantee and PW1 had paid up and apparently expects the appellants to reimburse him. There is no evidence of any claim in respect of the amount or at all by the guarantor on the appellants. And in any event the appellant plaintiffs have failed to prove the nexus between that guaranteed amount and the alleged breaches of the contract vis a vis

the Alpla and the Boe-Therm. We agree with the learned judge that this claim as presented was untenable.

Similarly the nexus (if any) between the next claim for RM200,000 being paid up capital ... which was complete dissipated' and the contract for the purchase of the two machines (or breaches thereof) has not been shown and it follows that there is no basis for this head of damages as against the defendants.

The last head of the claim for general damages was loss of expected profits of RM626,606.92 as aggregated for the three years: 1978, 1979 and 1980. Here again what the plaintiffs did was to throw the figures at the head of the court without proving any of the items that make up the amount. Further, as has been seen, by para 11 of the statement of claim the plaintiffs have stated that the problems with the Alpla were surmounted by August 1978. It follows that if there was loss of profits thereafter it must have been for reasons which have nothing to do with the respondents or their principals. And even for the period up to August 1978, as far as the evidence goes, it was not as if there was no production at all.

Now, what the plaintiffs had relied on were projections made by one Sandanamsamy (who was not called) and Anthony Segamony, PW2, for the years 1978, 1979 and 1980. These projections appear to have been made to support the plaintiffs' application to the bank for credit facilities and which appears to have been made sometime before the plaintiffs decided to invest in the machines. In cross-examination, PW1 the chairman of the plaintiff company, said with reference to the projections:

> The projections were prepared by Anthony Segamony — when he made the projections the company had not secured any contracts for the supply (of) plastic bottles. The projections were made partly for the purposes of bank facilities.

There is no evidence of contracts for the supply of bottles having been entered into, before or after the machines were commissioned or at all. Actual figures in respect of inter alia production and sales in 1978 were not divulges to the court. It would seem that there were no audited accounts after 1976. The explanation given for this is startling — they did not have the funds to have the accounts audited!

In *Cullinane v British 'Rema' Manufacturing Co Ltd* [1954] 1 QB 292 on the failure of a clay pulverising machine to pulverise at the warranted rate, it was held that the buyer of the machine was not entitled to claim damages based both in respect of the capital expended and also for loss of profits. Which is what the plaintiffs here have tried to do, claiming both the capital 'dissipated' as well as loss of profits. As to loss of profits Jenkins LJ said at p 308 of *Cullinane*:

> ... the case is one in which the plaintiff can claim damages for the breach of warranty, *the loss of profit he can show that he would have made if the plant had been so warranted.* (Emphasis added.)

The projections to be worth anything should have been backed by evidence of inter alia wages to be incurred eg employment contracts, costs of

materials eg quotations from suppliers, actual prices at which medical practitioners purchased bottles and so on. In the absence of such evidence or of the like, the basis of the projections and the projections themselves appear to be mere speculation on the part of PW2 and Sandanamsamy. The learned judge was perfectly justified in rejecting them as being mere 'conjecture'.

The plaintiffs having failed to prove liability and in any event having failed to prove that damages were suffered, we uphold the learned judge's decision that the claim should be dismissed with costs. It follows that the appeal has to be and is dismissed with costs.

**Abu Mansor JCA**: As a member of this panel, I have considered this appeal. My decision is the same as that of my learned brother, VC George JCA. I have had the benefit of reading his judgment, and I respectfully agree that for the same reasons stated therein this appeal must be dismissed with costs. All orders made by the learned judge in the court below are affirmed. The deposit paid into court by the appellant is to be paid out to the respondent towards account of its taxed costs.

*Appeal dismissed.*

Reported by Anne Khoo